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# In the Supreme Court of the United States

OCTOBER TERM, 1997

OHIO FORESTRY ASSOCIATION, INC.

*Petitioner,*

*v.*

SIERRA CLUB, ET AL.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF THE ALABAMA FORESTRY ASSOCIATION, AMERICAN PULPWOOD ASSOCIATION, ARKANSAS FORESTRY ASSOCIATION, ASSOCIATED OREGON LOGGERS,

[Additional *Amici Curiae* Listed on Inside Cover]

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**AS *AMICI CURIAE***
**IN SUPPORT OF PETITIONER**

## QUESTION PRESENTED

*Amici* will address the following question:

Whether the court of appeals erred in refusing to accord any deference to the decision of the United States Forest Service in this case.

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**INC., TENNESSEE FORESTRY ASSOCIATION, TEXAS FORESTRY ASSOCIATION, WASHINGTON CONTRACT LOGGERS ASSOCIATION, AND WEST VIRGINIA FORESTRY ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

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## INTEREST OF *AMICI CURIAE*

*Amici* are national, regional, and state trade associations representing all aspects of the forest products industry. All have a continuing interest in access to a stable and consistent supply of timber from the national forest system. *Amici* therefore have a compelling interest in the issue presented here: when decisions of the United States Forest Service (the "Forest Service" or "Service") regarding the management of national forests are due deference.

In this case, the Sixth Circuit rejected a long-range plan for management of the Wayne National Forest that was developed by the Forest Service, a federal administrative agency within the Department of Agriculture. The court of appeals found the plan flawed because it permitted "even-aged management," a common forestry practice that creates stands in which trees of approximately the same age grow together. Asserting that the Forest Service is politically driven and biased in favor of logging interests, the court of appeals concluded that the agency's decision to allow even-aged management was entitled to no judicial deference.

Unless set aside, this decision will have serious and destructive consequences for *amici* and their members. It will work a significant interference with the cultivation and harvesting of timber. It will prevent the development of rational plans for the management of national forests. And it will cast into doubt *all* administrative proceedings conducted by the Forest Service — proceedings that regularly affect *amici*. For these reasons, *amici* submit this brief to assist the Court in the



resolution of this case.[1]

## SUMMARY OF ARGUMENT

The Forest Service's decision in this case should have been accorded the most substantial deference. As a general matter, of course, courts must defer to administrative decisions in areas within the agency's expertise. And that rule applies with special force here because Congress has granted the Forest Service considerable discretion in balancing the multiple, and sometimes conflicting, goals of the National Forest Management Act of 1976 ("NFMA"). At the same time, the formulation of a Land and Resource Management Plan ("LRMP") necessarily turns on the exercise of technical and scientific judgments involving a wide range of interests — a factor that, again, militates in favor of deferring to the agency.

The Sixth Circuit's holding in this case, however, simply substituted its judgment for that of the Forest Service. Without *any* citation to the record or to the bases for the agency's decision, the court rejected the agency's conclusions out of hand. That was plain error. In fact, the Forest Service's LRMP was the product of a careful and thorough administrative decisionmaking process that was explained in detail, that was fully grounded in the record, and that expressly sought to balance the competing interests served by the statute. In contrast, the court of appeals' conclusion was premised on a series of simplistic ipse dixits that apparently were derived from its own preconceptions.

The error in the Sixth Circuit's decision was compounded by its bizarre conclusion that the Forest Service is due no

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[1] The parties have consented to the filing of this *amicus curiae* brief; letters indicating their consent have been filed with the Clerk of the Court. In addition, pursuant to this Court's Rule 37.6 *amici* certify that counsel for a party did not author this brief in whole or in part, and that no person other than *amici* made a monetary contribution to the preparation of the brief.

deference because it is institutionally biased. That conclusion was grounded on a misuse of the controlling statutes: the examples of "bias" cited by the court all involve structures and relationships created by Congress. And more fundamentally, the Sixth Circuit overstepped the proper judicial role. Any institutional problems in the operation of the Forest Service should be addressed by the political branches; "federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do." *Chevron USA Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 866 (1984).

## ARGUMENT

### THE FOREST SERVICE'S DECISION ADOPTING THE WAYNE LRMP WAS ENTITLED TO DEFERENTIAL REVIEW

The Sixth Circuit's decision in this case may fairly be characterized as astonishing. Declining to burden its decision with even a *single* citation to the administrative record, the court of appeals held the Forest Service's adoption of a detailed and elaborate LRMP to be arbitrary and capricious. Pet. App. 5a-6a.[2] The court then capped its excursion through the looking glass with the remarkable assertion that Forest Service decisions are due no deference at all because the agency suffers from institutional "biases" that "undermine[] even the facial neutrality of the National Forest Management Act." *Id.* at 8a. Because the Sixth Circuit again failed to tie this surprising conclusion to anything in the record, the court appears to have held as a matter of law that Forest Service decisions *never* are due deference.

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[2] The court contented itself with the blithe declaration that "it would be impractical to set forth the details of the administrative record here." Pet. App. 5a. Since other courts routinely set forth such details in their opinions, it is perhaps not surprising that the Sixth Circuit failed to elaborate upon this curious remark.



These conclusions plainly cannot be squared with the most fundamental principles of administrative law. A central tenet of our system of judicial review is that courts must defer to agency decisions. That rule applies with special force when, as here, the agency has applied its technical expertise in an area where it has been accorded substantial discretion by Congress. And in every case, agencies are presumed to operate with regularity and in good faith. The Sixth Circuit, however, managed to disregard *each* of these principles. Against that background, as this Court observed in another case where the lower court famously lost sight of basic tenets governing agency review, "[t]o say that the Court of Appeals' * * * reason for [setting aside the agency's decision] is insubstantial at best is a gross understatement." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557 (1978).

#### A. Courts Must Review Deferentially The Forest Service's Decision To Adopt A Land And Resource Management Plan

1. It should go without saying that, under the Administrative Procedure Act, courts may set aside agency action only if the action "was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements.'" *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 414 (1971) (quoting 5 U.S.C. § 706(2)). This means, of course, that the reviewing court must not substitute its judgment for that of the agency, but instead must determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* at 416.

As a consequence, it is a fundamental and oft-stated principle of administrative law that agencies are better equipped than are the courts to make determinations regarding matters within the agency's area of special competence. Thus, when reviewing factual determinations whose analysis "'requires a

high level of technical expertise,'" a court "must defer to 'the informed discretion of the responsible federal agenc[y].'" Marsh v. *Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989) (quoting *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976)). See also, *e.g.*, *Baltimore Gas & Elec. Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination, * * * a reviewing court must generally be at its most deferential"). "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh*, 490 U.S. at 378.

By the same token, it is basic that courts must avoid interfering with policy choices delegated to an agency by Congress. Where decisions "necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns," courts "appropriately defer to the agency entrusted by Congress to make such policy determinations." *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991); see also *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995) ("When Congress has entrusted [an agency] with broad discretion, we are especially reluctant to substitute our views of wise policy for [the agency's]."") And deference is of particular importance when an agency resolves "competing interests which Congress itself * * * intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Chevron USA*, 467 U.S. at 865-866.

2. These principles require that the Forest Service decision in this case be accorded the greatest possible degree of deference. While the Sixth Circuit evidently was of the view that the NFMA imposes strict and inflexible constraints on the Service (see Pet. App. 5a-6a), Congress actually gave the agency broad discretion in the adoption of an LRMP. At the same time, the formulation of an LRMP necessarily turns on the exercise of technical and scientific judgments that must balance



a range of interests and goals. In these circumstances — where the agency's decision "'involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations'" (*Chevron USA*, 467 U.S. at 844, quoting *United States* v. *Shimer*, 367 U.S. 374, 382 (1961)) — deference plainly is in order.

a. Congress has directed that the national forests be managed to achieve several different, often competing, goals. National forests were first established for "only two purposes — '[t]o conserve water flows, and to furnish a continuous supply of timber for the people.'" *United States* v. *New Mexico*, 438 U.S. 696, 707 (1978) (citation omitted). See 16 U.S.C. § 475. In 1960, Congress enacted the Multiple-Use Sustained Yield Act ("MUSYA"), providing that the forests "shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." *Id.* § 528.[3] That Act directs the Secretary of Agriculture "to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom." *Id.* § 529. The MUSYA defines "multiple use" as the management of resources so that they "will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services." *Id.* § 531. As one court of appeals has stated, these broad directives "breathe[ ] discretion at every pore." *Perkins* v. *Bergland*, 608 F.2d 803, 806 (9th Cir. 1979) (quotations omitted) (citation omitted).

The Forest Service has been delegated the challenging task of administering the national forests in a manner that most

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[3] The new uses were "declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established." *Ibid.*

appropriately advances these varied and competing purposes. Under the NFMA, the Forest Service must adopt and periodically revise for each national forest a long-range plan (the LRMP) that, consistent with the MUSYA, "provide[s] for multiple use and sustained yield of the products" of the national forest, and, in particular, "include[s] coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wildernesses." 16 U.S.C.§ 529.

Accordingly, the NFMA mandates long-range planning by the agency, but provides only the most general guidelines for the content of plans. The statute directs the agency to establish by regulation specific guidelines for developing LRMPs that further the broad goals of the program by, for example, "insur[ing] consideration of the economic and environmental aspects of various systems of renewable resource management" (16 U.S.C. § 1604(g)(3)(A)); "provid[ing] for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives" (*id.* § 1604(g)(3)(B); and "permit[ting] increases in harvest levels based on intensified management practices" (*id.* § 1604(g)(3)(D)).

The Forest Service, acting with the assistance of a panel of scientific advisers, has promulgated detailed regulations designed to satisfy these requirements. See 36 C.F.R. Part 219. Among other things, the regulations create procedures designed to assist the Forest Service in balancing the competing goals of national forest management. For example, for each LRMP, an interdisciplinary team formulates "a broad range of reasonable alternatives" intended to "provide an adequate basis for identifying the alternative that comes nearest to maximizing net public benefits." 36 C.F.R. §219.12 (f).

It could not be clearer that managing the national forests under these statutes requires the Forest Service to make policy judgments that balance the competing legislative goals. As the Fifth Circuit has observed, "protecting forest resources involves



making trade-offs." *Sierra Club* v. *Espy*, 38 F.3d 792, 802 (5th Cir. 1994); see also *Mountain States Legal Foundation* v. *Glickman*, 92 F.3d 1228, 1238 (D.C. Cir. 1996) (forest management statute's statement of a particular purpose "does not mean that [such purpose] must be maximized at the expense of all other values"). Indeed, the Forest Service inevitably makes such trade-offs each time it develops an LRMP. See *Big Hole Ranchers Ass'n, Inc.* v. *United States Forest Serv.*, 686 F. Supp. 256, 264 (D. Mont. 1988) (Forest Service in developing LRMP "has wide discretion to weigh and decide the proper uses within each area"); cf. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 358 (1989) (Forest Service operates under "broad grant of authority" under 16 U.S.C. 479 to permit use and occupancy of national forests).

b. At the same time, the agency's judgments are informed by its substantial expertise in the various sciences relevant to forest management, including the field of silviculture. Managing a healthy forest cannot turn on the sorts of simplistic formulas offered by the Sixth Circuit. See, *e.g.*, Pet. App. 6a ("recreation like fishing and hiking is harmed by clearcutting"). Instead, the agency must make a range of highly technical judgments about the management techniques that will contribute to the diversity of plant and animal life; that will support the effective use of (and facilitate access to) the forest for recreational purposes; that will allow for sustainable production of timber; and that will maintain the forest's health.

As explained in a classic text on the subject:

> Silviculture has been variously defined as: the art of producing and tending a forest; the application of the knowledge of silvics in the treatment of a forest; the theory and practice of controlling forest establishment, composition, and growth.
>
> * * *

> The efficient practice of silviculture * * * demands as much knowledge of such fields as ecology, plant physiology, entomology, and soil science (to name but a few) as a forester can acquire.

DAVID SMITH, THE PRACTICE OF SILVICULTURE 1-2 (7th Ed. 1962). See also RALPH NYLAND, SILVICULTURE: CONCEPTS AND APPLICATIONS 8 (1996) ("[S]ilviculturists draw upon the principles and theory amassed through scientific inquiry in botany, zoology, soil science, physical sciences, ecology, silvics, managerial science, economics and quantitative methods".). The courts have thus recognized that "'silviculture' is in fact a technical field, and not just one with a dry and forbidding vocabulary." *Cronin* v. *United States Dep't of Agriculture*, 919 F.2d 439, 444 (7th Cir. 1990). Accordingly, "it is imprudent for generalist judges * * * to consider testimonial and documentary evidence bearing on [silvicultural] questions unless the evidence has first been presented to and considered by the agency." *Ibid.* "The court must assume the Forest Service fully understands the technical aspects of forest management and deserves the benefit of the doubt on their decisions that required consideration of these issues." *Inland Empire Public Lands Council* v. *Schultz*, 807 F. Supp. 649, 652 (E.D. Wash. 1992).

Indeed, Congress emphasized that very point when it enacted the NFMA, remarking on the technical nature of the matters committed to the Forest Service's discretion. In a principal statement of Congress's purpose, Senator Humphrey declared that the NFMA was "designed to get the practice of forestry out of the courts and back to the forests." 122 Cong. Rec. 33835 (Sep. 30, 1976). Other members of Congress echoed the importance of leaving matters in the hands of the Forest Service. Senator Packwood, for example, stated that

> [w]e have a bill designed to cover a broad range of forest conditions and management practices. Yet, this is accomplished without the Congress tying the hands of the



> Forest Service. * * * It is a recognition that no two forests are alike, and that prescriptive legislation is more often a handicap than a help to forest management professionals.

122 Cong. Rec. 33838 (Sept. 30, 1976). See also, *e.g.*, 122 Cong. Rec. 34229 (Sept. 30, 1976) (remarks of Rep. Symms) ("Detailed prescriptive language was specifically avoided, since it was recognized that it would be impossible to write into law detailed requirements which would fit the tremendously varied forest and rangeland conditions that exist on the national forests."); *ibid.* (remarks of Rep. Weaver) (NFMA "establishes * * * a framework of public policy for national forest management, and leaves on the ground forest management to the foresters. * * * It does not prescribe forestry techniques.")[4]

For these reasons, so long as the Forest Service's judgments are "not unreasonable," a court must "defer to the agency's determination." *Espy*, 38 F.3d at 802; see also, *e.g.*, *Sierra Club* v. *Cargill*, 11 F.3d 1545, 1458 (10th Cir. 1993) ("Applying the deferential standard is especially important where, as here, the agency determination is extremely fact-bound"). Here, the Forest Service amply justified its decision to allow even-aged management in the Wayne National Forest, by reference to both policy and science. There was no basis for the court of appeals to second-guess — or, worse, entirely ignore — the agency's reasonable judgments.

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[4] The Senate Subcommittee on Public Lands, in recommending guidelines for timber harvesting, previously had stated that it "did not presume to substitute its judgment for that of qualified professionals who have on-the-ground knowledge and familiarity with local needs and conditions." Staff of Sen. Subcomm. on Public Lands, 92d Cong., 2d Sess., Clearcutting on Federal Timberlands, Report to the Comm. on Interior and Insular Affairs 8 (Comm. Print 1972).

### B. The Court of Appeals Improperly Disregarded The Forest Service's Technical and Policy Reasons For Adopting Particular Silvicultural Management Practices

In light of the complex array of factors that go into the formulation of an LRMP, it is not surprising that the Forest Service's decision in this case did — as, indeed, every decision under the NFMA must — involve an application both of the agency's technical scientific expertise and of its considered discretion. The court of appeals, however, gave no deference at all to the Forest Service's decision. While grudgingly mouthing the standard governing the review of agency action,[5] the Sixth Circuit proceeded to substitute its own judgment for that of the agency. Without *any* citation to the record or to the bases for the Forest Service's decision, the court rejected out of hand the Service's conclusion that "its even-aged management plan * * * will provide new opportunities for recreation that will, in turn, preserve and enhance the diversity of plant and animal communities in the Wayne National Forest." Pet. App. 6a.[6] In doing so, the Sixth Circuit entirely disregarded the legitimate reasons and substantial evidence that underlay the Forest Service's decision to permit even-aged management in the Wayne forest.

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[5] The court stated: "[W]e must decide whether the Forest Service took a hard look at the relevant factors and reached a decision that was neither arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law." Pet. App. 5a.

[6] The court of appeals also found that the Forest Service had improperly decided to "utilize even-age management logging as if it were the statutory rule, rather than the exception." Pet. App. 6a. As the brief for petitioner demonstrates, however, the court of appeals' view that the NFMA disfavors even-aged logging was plainly wrong. See *Sierra Club* v. *Espy*.



There are two recognized systems for administering timber resources: even-aged management and uneven-aged management. As the district court correctly observed when it affirmed the Forest Service decision:

> The selection of the appropriate system and harvest method depends upon the judgment of the forest planner, taking into consideration the circumstances of the forest or subparts thereof, the goals of the forest plan and all applicable statutory and regulatory mandates.

Pet. App. 16a. As the district court also noted, "[e]ach silvicultural system and its respective harvest methods have advantages and disadvantages." *Ibid.* (footnote omitted). And broad discretion is most important at the preliminary stage where the LRMP is formulated, because the final selection of a harvest method occurs when the decision is made to hold a site-specific timber sale.

Choosing a forest management method thus requires complex technical judgments on how best to juggle competing interests. For example, as the Forest Service made clear in this case, uneven-aged management aims at maintaining stands of trees that contain a range of age classes in each area. LRMP at C-3. This management system provides for the periodic harvest of a portion of the trees in each age class in each stand, either individually or in selected groups. *Id.* at C-1. Uneven-aged management preserves an uninterrupted leaf canopy, making logging activity less obvious to recreationists, but also encourages a forest-wide decline in shade intolerant plant and animal species — including the most commercially valuable trees. *Id.* at C-2.

Even-aged management, in contrast, creates a mosaic of different-aged stands, each containing trees of about the same age. *Id.* at C-3. The three recognized harvest methods for this management technique are clearcutting, shelterwood, and seed tree. Clearcutting involves cutting down all trees in an area at one time; the shelterwood method involves removing all trees

in a series of two to three cuts; and the seed tree method involves harvesting all but a few well-distributed trees, which are themselves removed after they provide seed for natural regeneration. *Id.* at C-4. In contrast to uneven-aged management, which allows only shade-tolerant species to flourish, even-aged management permits the periodic regeneration of plant and animal species that thrive in direct sunlight. *Id.* at C-2.

The Forest Service amply supported its preliminary selection of even-aged management for many areas in the Wayne National Forest. First, the Service concluded that even-aged management is "necessary" to maintain "high quality hardwoods on a sustained yield basis." *Id.* at C-6 . The Service supported this conclusion by reference to the specific growing conditions of various tree species in the Wayne National Forest. See, *e.g.*, Draft Environmental Impact Statement (DEIS) at 4-19; LRMP at C-6 to C-7. The Service also concluded that even-aged management would, among other things, increase species diversity by permitting the periodic regeneration of plants and animals that use forest clearings as habitat (DEIS at 4-18); create forest stands that are "more resistant to insect and disease attacks" (Final Environmental Impact Statement (FEIS) at 2-17); permit longer intervals between harvest activity, thereby minimizing disruption in each area (LRMP at C-3); and increase opportunities for certain recreational activities, including hunting (FEIS at 2-16). The court of appeals offered *absolutely no reason* to believe that these judgments were erroneous.

The Forest Service also supported its initial approval of clearcutting as the harvest method in many areas. The Service found clearcutting to be "the most effective method" for obtaining "desirable natural regeneration in central hardwood stands." LRMP at C-4. The Service observed that clearcutting "normally results in more seedlings and new sprouts than any other harvest method." *Ibid.* Moreover, the Service concluded:



> [c]learcutting is especially appropriate for stands where the residual trees would not be worth retaining for a future crop, when stands have had the best trees removed in past harvests, or in areas which have insufficient trees to adequately use growing space.

*Id.* at C-5. The Service also noted that clearcutting "imitate[s] nature" by reproducing the natural clearing that "occurs as a result of wildfire, wind, insects and disease." FEIS at 2-18. Again, the court of appeals offered no reason to doubt — indeed, it failed even to note — these conclusions.

By including even-aged management as part of the overall LRMP, the Forest Service expressly sought to balance the competing values served by the statute. The agency's efforts to accommodate those interests are reflected in its extensive responses, set forth in the FEIS, to the many public comments on the proposed LRMP. For example, the Service fielded comments from those who sought *more* clearcutting, which the commenters believed would more rapidly improve timber quality. Noting that "changes which are perceived as desirable to one person may be undesirable to another," the agency responded:

> [b]ecause the National Forest is managed under the concept of multiple uses to best meet the needs of the people we attempt to provide a wide range of conditions throughout the Forest. We do not intend to emphasize timber management any more than other resources but do recognize it as an important tool to help achieve our long-term management objectives.

FEIS at 2-20. On the other hand, in responding to those supporting maintenance of a "nearly continuous forest canopy," and who therefore opposed all clearcutting, the agency noted that even extensively logged management areas would have no more than 10 percent "open canopy" from clearcutting at any time. FEIS at 2-23. The agency's ultimate decision, quite

clearly, reflected its considered view of the proper compromise between widely divergent public interests.

In these circumstances, the agency's decision "represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." *Chevron U.S.A.*, 467 U.S. at 865 (footnotes omitted). In contrast, the court of appeals' conclusion was premised on a series of simplistic ipse dixits that apparently were derived from its own preconceptions. The Sixth Circuit thus offered the platitude that "[m]ost recreation does not require timber harvesting" (Pet. App. 6a), an observation that entirely disregarded the Service's findings about the benefits for new recreational opportunities and species diversity offered by its even-aged management plan. And the court opined that "recreation like fishing and hiking is harmed by clearcutting" (*ibid.*), wholly ignoring the Service's conclusions about the ways in which its plan would advance forest health, increase the diversity of plant and animal communities, permit longer intervals between harvest activity, and facilitate recreational activities such as hunting. Given the agency's well-considered and factually grounded decision, it is impossible to avoid the conclusion that the court of appeals came to its holding "simply because the court [was] unhappy with the result reached" by the Service. *Vermont Yankee*, 435 U.S. at 558.

### C. The Sixth Circuit's Unsupported Allegations of Agency "Bias" Did Not Justify Its Failure To Defer To The Agency

The court of appeals' decision thus reflects a manifest departure from the ordinary rules governing the review of agency decisions. The most bizarre aspect of the Sixth Circuit's holding, however, was its breezy conclusion that the Forest Service is due no deference because the agency is institutionally



"biase[d]" (Pet. App. 8a) and because "forest planning, as practiced by the Forest Service, is a political process replete with opportunities for the intrusion of bias and abuse." *Id.* at 7a. This conclusion is premised on a misunderstanding both of the governing statutes and of the court's role.

1. The Sixth Circuit identified several sources of what it termed the Forest Service's "bias." But the court of appeals evidently mistook for bias the Service's legitimate, and congressionally-mandated, institutional mission. For example, the court of appeals complained that "the Forest Service has a history of preferring timber production to other uses." *Ibid.* But as the court itself recognized, timber production has historically been the *primary* purpose of the national forests, which were "[c]reated, in part, to ensure a reliable timber supply." *Ibid.* Although the MUSYA expanded the aims of national forest management to accommodate additional uses, this Court has described these new uses as "secondary" to the original purposes. *United States* v. *New Mexico*, 438 U.S. at 715. Thus, even today, "[t]imber harvesting is clearly a major goal of the forest management statutes." *Mountain States Legal Foundation*, 92 F.3d at 1238.

The court of appeals also identified as a source of bias the "sharing of timber proceeds with local communities." This, the court opined, increases the "dependency of these communities on timber production," which both encourages the Forest Service to "make management decisions to support perceived needs in the communities" and "causes over-harvesting and destructive harvesting methods." Pet. App. 7a. But this "sharing," however harmful the court may deem it, is mandated by statute. See 16 U.S.C. § 500. The court could not properly overturn the agency's decision based on its own view that the management of national forests is too closely tied to the fate of neighboring rural communities, especially when Congress created structures designed to further such linkage.

Similarly, the court cited as a source of bias the fact that the Forest Service budgeting process "allows the Forest Service to keep a percentage of the funds it realizes from timber sales." Pet. App. 7a. But this agency revenue-sharing also was specifically mandated by Congress. See 16 U.S.C. § 576b-576d. If such statutory provisions — which the court termed "biases and constraints" — indeed influence the agency's decisionmaking process, Congress must be presumed to have intended such effects, and the court may not disregard the agency's views for that reason.

In addition, the court of appeals voiced concern that, in response to petitions from "local constituencies," "politicians" may "place pressure on the Forest Service" to sustain the revenue flowing from timber harvesting. Pet. App. 7a. But the political process *quite properly* may affect the exercise of agency discretion to make policy judgments. As the D.C. Circuit has stated:

> Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of those officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall. As judges we are insulated from these pressures because of the nature of the judicial process in which we participate; but we must refrain from the easy temptation to look askance at * * * lobbying efforts * * * merely because we see them as inappropriate in the judicial context.

*Sierra Club* v. *Costle*, 657 F.2d 298, 400-401 (D.C. Cir. 1981) (footnotes omitted). Furthermore, "Americans rightly expect their elected representatives to voice their grievances and preferences concerning the administration of our laws." *Id.* at 409. Nor do such pressures operate in only one direction. Recreationists, environmentalists, businesses dependent on



tourism, and other interest groups can and do seek to influence Forest Service decisions.

So long as "political pressure" does not go beyond legitimate bounds (see, *e.g.*, *District of Columbia Fed'n of Civic Ass'n* v. *Volpe*, 459 F.2d 1231, 1245-46 (D.C. Cir. 1971)), such activity does not impugn an agency's decisions or justify more searching judicial review. In this case, the Court of Appeals identified no evidence to suggest that the Forest Service had been influenced *improperly* in its decision to adopt the LRMP. Under these circumstances, the Forest Service was entitled to a presumption of good faith in its decisionmaking. See *United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.").

2. While the court of appeals thus misunderstood the relevant statutory context, its more basic error lay in confusion about which branch of government has the authority to answer "fundamental policy questions." *Vermont Yankee*, 435 U.S. at 558. Unless an agency's decision is inconsistent with law or unsupported by the evidence, a court may not set that decision aside simply because individual judges believe that the agency has a bad attitude.

> Judges * * * are not part of either political branch of government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, * * * [w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices.

*Chevron U.S.A.*, 467 U.S. at 865. It therefore is a central tenet of our system that

> federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do. The responsibility for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

*Id.* at 866, quoting *TVA* v. *Hill*, 437 U.S. 153, 195 (1978).

If the President believes that the Forest Service is too responsive to the needs of local communities (see Pet. App. 7a), he may (insofar as his actions are consistent with governing statutes) change the Service's orientation. And if Congress fears that institutional constraints on the Forest Service distort the agency's decisions, it may inquire into the matter and cure any problems through legislation. But a court is in no position to determine, as a general matter, that a particular agency is failing to act "in the best interest of the American people." Pet. App. 8a. The Sixth Circuit's attempt to make such a determination here should not stand.

## CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted.

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